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IN THE

# Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,

*Petitioner*,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether, as the Tenth Circuit held below in conflict with a decision of the Second Circuit and the clear import of this Court's decisions, a court determining whether property subject to public access constitutes a public forum for First Amendment purposes may ignore the location of the property, the characteristics and use of surrounding private property, and the government's intent with respect to the property.

2. Whether, as the Tenth Circuit held below in conflict with a decision of the Nevada Supreme Court, a private entity is prohibited by the First Amendment from controlling disruptive protests and other expressive conduct on its own private property merely because the property is subject to a limited easement allowing public passage.

3. Whether, as the Tenth Circuit held below in conflict with the analysis in Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992), a government cannot validly close a public forum simply by selling the underlying property to an entity that subsequently makes significant alterations to the property's physical characteristics and fundamentally changes the property's principal use.

## PARTIES TO THE PROCEEDING

The petitioner is the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("the Church"). The respondents are the First Unitarian Church of Salt Lake City, Utahns for Fairness, Utah National Organization for Women, and Craig S. Axford. In addition to the petitioner Church, Salt Lake City Corporation was a defendant below.

## RULE 29.6 STATEMENT

Petitioner Church is a non-governmental corporation with no parent company. No publicly traded corporation owns 10% or more of this corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion and judgment of the court of appeals are reported at 308 F.3d 1114 (10th Cir. 2002), and are reproduced in the appendix to this petition ("Pet. App.") at 1a-32a. The unpublished order of the court of appeals denying the petition for rehearing and rehearing en banc appears at Pet. App. 75a-76a. The judgment of the United States District Court for the District of Utah granting the Church's motion for summary judgment is reported at 146 F. Supp. 2d 1155 (D. Utah 2001), and is reproduced at Pet. App. 33a-74a.

## JURISDICTION

The judgment of the court of appeals was entered on October 9, 2002. The court of appeals denied rehearing and rehearing en banc on November 14, 2002. On February 5, 2003, Justice Breyer granted petitioner an extension of time to and including March 14, 2003, within which to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

1. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

2. A copy of Salt Lake City Ordinance No. 28 of 1999, closing a portion of Main Street between North Temple and South Temple Streets running through the Church's property is found at Pet. App. 77a-85a.

## STATEMENT OF THE CASE

In the decision below, the Tenth Circuit invalidated restrictions imposed by a church on the public's use of the church's private property because the court concluded that a limited public easement for access and passage created a traditional public forum on the church's property. The Tenth Circuit's decision conflicts with a recent decision of the Second Circuit on the question of whether, in conducting a public forum analysis, a reviewing court must give weight to (1) the location and characteristics of the property at issue (including the surrounding locale); and (2) the government's intent with respect to the property. Moreover, the decision below conflicts with a decision of the Nevada Supreme Court which, in almost identical circumstances, held that a public access easement on private property does not create a public forum. The decision below also raises important and recurring issues about the ability of state and local governments to close public fora under this Court's First Amendment precedents, and the standards that apply to such decisions.

1. In 1998, Salt Lake City ("the City") decided to sell a small parcel of land on which a segment of Main Street sat pursuant to the City's plan for downtown redevelopment. This two-acre parcel of land had never been used for protests in any significant way. Indeed, since 1995, the City had not issued even one permit for demonstrations or other expressive activities on the property. Summ. J. Mot. ¶ 28.

Because the Church previously had purchased the underground rights to the parcel to construct a parking facility, it held a right of first refusal to the surface rights. Pet. App. 3a & 35a. Therefore, the City approached the Church to inquire

whether the Church would be interested in purchasing the surface rights. The City assumed the Church would have such an interest because the Church's international headquarters and sacred sites are located on either side of this portion of Main Street. Pet. App. 2a-3a & 34a. Specifically, the Church's administration buildings lay to the east, with the Church's Temple Square to the west. See *id.* 34a & 106a (diagram of Church Plaza).

As the City predicted, the Church was interested. From the beginning, however, the Church made clear that its interest depended on its ability to purchase all the rights necessary to control activities on the property. Summ. J. Mot. ¶ 51. After the City conducted public hearings on the proposed sale, the City passed Ordinance No. 28 of 1999, closing this small portion of property to public use. See Pet. App. 77a-85a. The City then deeded the property to the Church for more than $8.1 million, which was at least its fair market value, and did so with the assurance that the Church would have the full ability to control expressive activities there. *Id.* at 35a.

In the Special Warranty Deed, the City did retain an extremely limited public easement across the Church's property. But that easement was expressly limited to "pedestrian access and passage *only*." Pet. App. 87a (emphasis added). And the deed stated that the "Property is and shall at all times remain the private property of [the Church]" and that nothing in the easement "shall be deemed to create or constitute a public forum, limited or otherwise." *Id.* at 88a & 89a. Moreover, consistent with the religious purposes of the Church Plaza that the Church planned to build, the deed expressly stated that the limited rights granted to the public did not include such activities as drinking alcohol, protesting, leafleting, or engaging in indecent or obscene speech, dress or conduct. See *id.* at 89a.

The limited easement, moreover, had no specific metes and bounds description. Rather, under the express terms of the Deed, the Church was given the right "to restrict the pedes-

trian access and passage" to specific areas of the Plaza provided that pedestrian flow "shall not be unreasonably obstructed or limited." Pet. App. 88a.

After purchasing the property from the City, the Church spent more than $20 million renovating the property, altering its characteristics, and constructing a religious plaza on it. Cf. Pet. App. 97a (photo of Main Street), with *id.* at 98a-104a (views of Church Plaza). The Church tore up and hauled away the former street and sidewalks. As a result, nothing remains of the street and sidewalks that once existed on the property. See Summ. J. Mot. ¶ 176.

The Church then constructed a new and beautiful religious plaza. Entryways were built on each end of the plaza with waterfalls and planters. Signage was erected at each entrance with the Church's name and logo, thus demarcating the entire plaza area as Church property. Plaques were set up commemorating the Church's religious history. Statues of some of the Church's religious leaders were erected. And, in the middle of the plaza, directly opposite the Salt Lake Temple, a large reflecting pool was installed to reflect the temple and project its image onto the plaza.[1] Pet. App. 50a.

Thus, as the Tenth Circuit expressly acknowledged, the new Church Plaza now fits seamlessly into the Church's campus. Pet. App. 6a. Indeed, the Plaza now sits in the *center* of the Church's international headquarters and is virtually surrounded by Church property. See *id.* at 105a-106a. For example, the Church's "Administration Block" (containing the Church Administration Building and other buildings of religious significance) abuts the plaza on the east. "Temple Square," a block containing the Salt Lake Temple, the historic Tabernacle, Assembly Hall, and other sacred buildings, abuts the plaza to the west. In fact, the Church's most holy build-

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[1] Once complete, on October 8, 2000, the Church Plaza was dedicated to God by the Church's President and Prophet in solemn religious services. *See* Pet. App. 35a.

ing – the Salt Lake Temple – rises up just a few dozen feet off the plaza to the west. And the new entrance to the Church's underground parking garage lies to the north. See *id.* Throughout this campus, moreover, lie beautiful gardens, grassy open spaces, fountains, and places for quiet reflection.

In short, people entering the newly constructed Church Plaza know immediately that they are in the heart of a religious enclave – an enclave constructed and maintained solely by the Church. Pet. App. 50a-52a.

The Church Plaza, moreover, has no sidewalks. Summ. J. Mot. ¶ 176. The walking paths of the old sidewalks no longer exist, and structural elements on the plaza prevent individuals from walking in a straight line from North Temple Street to South Temple Street within the dimensions of what were once the City sidewalks. *Id.* Instead, the Church Plaza features paved walking areas that are organized around planters, benches, the reflecting pool, and other amenities. *Id.* The result is that a visitor can take many different routes to arrive at many different destinations within the Church campus or beyond. *Id.*

For all these reasons, the Church Plaza bears no resemblance to the former City streets and sidewalks it replaced – a point that becomes readily apparent by comparing pictures of the old Main Street, see Pet. App. 97a, to pictures of the new Church Plaza, see *id.* at 98a-104a. Nor does the plaza bear any resemblance to the four large public streets – South Temple Street, North Temple Street, West Temple Street and State Street – that now surround the Church's headquarters and provide over one mile of wide public sidewalks for protests, demonstrations, and other forms of speech. See *id.* at 61a & 106a.

The principal use of the land on which the plaza sits also has changed dramatically. Pet. App. 51a-52a. The loud city street and sidewalks have now been replaced by an area of quiet tranquility and reflection. Brides and grooms emerging

from their marriage ceremonies in the temple congregate on the plaza for photographs and quiet celebration. Other Church members – some 4,500 a day – use the plaza to enter the temple so they can participate in other sacred rites. *Id.* at 51a. And many thousands of Church employees, visitors, and tourists use the plaza every day to access other Church sites. As a result, the vast majority of pedestrians who enter the Church Plaza now do so as a means to a destination *within* the Church's downtown campus. *Id.* at 52a.

2. Long after the Church had purchased the property, had torn up the street and sidewalks, and had begun construction of the Church Plaza, respondents in this case filed suit against the City, claiming that the restrictions on activities outlined in the Deed violated the First Amendment. They claimed that the easement created a public forum on the Church Plaza. The Church intervened in the lawsuit to protect its property rights.

In a detailed opinion, the district court ruled that, as a matter of law, the City's easement was at most a nonpublic forum, if it was a forum at all, and upheld the deed's limits respecting protests, picketing and distribution of materials on the property. See Pet. App. 58a & 62a. Consistent with this Court's precedents, and especially Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992), the district court reasoned that the property had ceased to be a public forum because (1) it was sold to a private entity, (2) its physical character was changed, (3) its principal use was altered, and (4) the City expressly intended to terminate all public free speech rights thereon. Pet. App. 48a. Because the easement could be considered, at most, a nonpublic forum, the district court held that the restrictions in the Deed need only be reasonable. Concluding that they were, the court entered judgment in favor of the City and the Church. *Id.* at 58a-60a.

3. The court of appeals reversed. Pet. App. 32a. The Tenth Circuit began by holding that "[e]asements are . . . con-

stitutionally cognizable property interests" and therefore "constitute a significant enough property interest" to be "subject to forum analysis." *Id.* at 12a. Applying this principle, the Tenth Circuit held that the fact that the land on which the Church Plaza sits belongs to the Church does not prevent it from being a public forum. Instead, the Tenth Circuit held that private property can be a public forum if it is "regulat[ed]" or "burdened by the government," and if the property is similar in "objective characteristics" and "purpose" to other public fora owned by the government. *Id.* at 11a, 12a, 16a & 18a. Because the Tenth Circuit found that the easement "burdened" the Church's property, and that the easement had a purpose and function similar to a public sidewalk, the court held that the easement gave rise to a public forum on the Church's property. *Id.* at 28a. The court further held that the use limitations in the Special Warranty Deed could not satisfy the strict scrutiny requirements invoked as a result of its public forum holding. *Id.* at 30a-31a.

## REASONS FOR GRANTING THE PETITION

This case warrants the Court's review for three distinct reasons that extend far beyond the holding's serious practical implications for the Church and the City. First, the decision below conflicts with a decision of the Second Circuit on whether, in determining if property subject to public access rights constitutes a public forum, a reviewing court must give weight to the location and characteristics of the property (including the nature of surrounding locale), and to the government's intent with respect to that property. Second, the decision below conflicts with an earlier decision of the Nevada Supreme Court on a narrower issue – whether a walkway on *private* property subject to a public access easement can be deemed a public forum for First Amendment purposes. Third, the decision below raises a fundamental issue also embedded in *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003) (granting petition for certiorari): Under what circumstances

may a government validly close a public forum that has previously existed on a particular piece of government property? Each of these reasons for granting review will be addressed in turn, followed by a brief discussion of the significant constitutional and practical problems created by the Tenth Circuit's decision.

## I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT BETWEEN THE SECOND AND TENTH CIRCUITS ON HOW TO APPLY PUBLIC FORUM ANALYSIS TO PROPERTY SUBJECT TO PUBLIC ACCESS RIGHTS.

The decision below directly conflicts with the Second Circuit's analysis on the question of how to apply public forum analysis to property that is subject to public pedestrian access. See *Hotel Employees & Rest. Employees Union Local 100* v. *City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002). In *Hotel Employees*, the Second Circuit held that a plaza running through the Lincoln Center arts complex in New York City did not constitute a public forum for First Amendment purposes, even though it was subject to public access rights. On the other hand, the court below held that the local government's limited property interest in the Church Plaza at issue here *did* create a public forum even though the underlying land now runs through the middle of an international religious headquarters and, indeed, is privately owned.

The conflict between the two cases is readily apparent, and it arises solely from the two very different legal standards applied by the respective courts of appeals. In the former instance, the Second Circuit considered all "relevant factors," including the plaza's "location, use, function, and purpose, together with the City's intent." *Id.* at 552. In the latter, the Tenth Circuit specifically rejected some of these factors, including the property's location and the government's intent, and opted instead for a constricted test that focuses only in the abstract upon whether the property is functionally similar to a

public sidewalk. Pet. App. 15a-16a. In their application, emphasis, and requirements the approaches are totally different. And, in the case of plazas like those at issue here and in *Hotel Employees*, this difference in approach is outcome-determinative.

1. *The Second Circuit Analysis.* In *Hotel Employees*, the Second Circuit engaged in a broad and searching analysis to determine whether the Lincoln Center Plaza constituted a public forum. This analysis focuses on all "relevant factors," including the plaza's "physical characteristics," the "objective ways in which it is used," and "the City's intent in constructing and opening it to the public." 311 F.3d at 546-47, 552.

In applying this analysis, the Second Circuit first examined the physical characteristics of the Lincoln Center Plaza. In doing so, the court found it important to examine the context of the plaza, *id.* at 547, including the nature and use of the surrounding property. It therefore spent a significant portion of its opinion describing the various art and performance buildings that surround the plaza, the streets that abut the plaza, and the various landmarks and elements that make up its locale. See *id.* at 549-50.

Given the presence of these "surrounding performing arts buildings," the "aesthetically pleasing" environs of the plaza, and the fact that the Plaza served as the "centerpiece" of a civic complex, the Second Circuit concluded that "pedestrians visiting the Plaza likely understand that they 'have entered some special type of enclave,'" *id.* at 550, and that the plaza was therefore something far different than a traditional public forum. Additionally, again looking to the surrounding environs, the Second Circuit concluded that "because the Plaza is not surrounded by government buildings, it is easily distinguished from those plazas and squares in which political speech has historically been protected." *Id.* at 552. Taking all of these surroundings into account, the Second Circuit de-

termined that "the Plaza's physical location distinguishes it from a typical recreational park or town square." *Id.* at 550.[2]

Next, the Second Circuit examined the ways in which the Lincoln Center Plaza is used. Again, however, it did not conduct its analysis without reference to the surrounding properties or buildings. Instead, it identified as "the primary factor" in its analysis on this point "how the *locale* is used." *Id.* at 547 (emphasis added) (internal quotation marks omitted). Thus, it viewed the plaza as an integrated part of the larger Lincoln Center, concluding that one of the plaza's primary functions was to serve as a "centerpiece" for that complex, connecting the various performing arts buildings and other attractions and serving as a "gathering place for those attending performances at Lincoln Center." *Id.* at 550.

This conclusion was not affected by the fact that "the Plaza is visited and used by members of the public who are not attending events at Lincoln Center," or that "the Plaza was designed as an open, public space connected to the city's 'major thoroughfares.'" *Id.* The "ability of pedestrians to cross the Plaza as a short-cut between surrounding streets," the Second Circuit instructed, had to be viewed in context, and weighed against the much larger numbers of persons who actually used the plaza to access Lincoln Center itself. *Id.* In that balance, the fact that "non-patrons use the Plaza for the purpose of traversing between surrounding streets," is

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[2] Several other courts of appeals have inquired into the characteristics of surrounding property to determine whether a parcel of land subject to a right of public access was also a public forum. *See, e.g.*, *Henderson* v. *Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (inquiring into the characteristics of surrounding property to determine whether sidewalk near Vietnam Veterans Memorial was distinguishable from traditional sidewalks); *Brister* v. *Faulkner*, 214 F.3d 675, 682-83 (5th Cir.) (considering surrounding property to assess whether there was any indication or physical demarcation between city sidewalks and state university grounds that would have given notice to an individual that she had entered into a "special 'enclave'"), *cert. denied*, 531 U.S. 985 (2000).

"merely an incidental feature" to the "principal function" of the Plaza – to serve as "centerpiece" and "entrance plaza for the Lincoln Center Complex." *Id.*

Finally, the Second Circuit evaluated the City's intent in the construction of the Plaza and in opening it to the public. Like its analysis of the preceding two factors, the Court's examination of this issue was conducted in the context of the broader Lincoln Center complex. The Second Circuit did not, for example, limit its inquiry to the fact that the City designed the property to encourage "passers-by to enter and pass through the Plaza." *Id.* at 551. Instead, it engaged in a broad analysis of a number of factors, including whether the City had "sought to limit organized speech in the Plaza," and whether, through agreements or regulations, it had "evidenced an intent to conserve the Plaza's function" as something less than a traditional public forum. *Id.* On this point, moreover, the court concluded that the City had a "strong interest in preserving the Plaza for its intended function," and that "permitting speech on all manner of public issues in the Plaza" would compromise the Plaza's status as "a specialized space devoted to contemplation and celebration of the arts." *Id.* at 552.

Taking all these factors into account, the Second Circuit rejected the claim that the Plaza constituted a public forum: "Consideration of the relevant factors, *i.e.* the Plaza's location, use, function, and purpose, together with the City's intent in building the space, demonstrates that permitting all forms of expressive activity in the Plaza would be incompatible with its 'intended purpose.'" *Id.* This was so, the Court determined, even though the public had the right to use the plaza as a pedestrian thoroughfare, *id.* at 550, and even though the plaza thus shared "some of the same physical characteristics as sidewalks or parks." *Id.* at 551 n.12.

2. *The Tenth Circuit Analysis.* The Tenth Circuit's approach stands in stark contrast to that of the Second Circuit. Rather than conducting a broad analysis of all the relevant

factors, the court below focused on the government's property interest to the exclusion of all other considerations.

Thus, unlike the Second Circuit, the Tenth Circuit refused to give any weight to the physical characteristics of the locale. Similarly, it found irrelevant the fact that the plaza over which the easement runs is surrounded virtually on every side by religious buildings and sacred sites, with the Church's name and logo at the entrances, and with religious statuary and plaques throughout. Indeed, the court below failed even to mention the nature and location of the plaza as relevant to its public forum analysis. And, in direct contrast to the Second Circuit, it did not ask whether government buildings surround the plaza, or whether those who come onto the plaza would view it as a special enclave different from the parks and sidewalks that generally constitute a public forum.

Instead, the Tenth Circuit engaged in a very narrow analysis, focusing on the government's property interest while ignoring everything else: "[I]t is the purpose of the easement, the property that is a forum of some type, and *not* the purpose of the Church plaza, *the surrounding property*, that is at issue." Pet. App. 22a (emphasis added).

The Tenth Circuit adopted the same position regarding the property's use. It expressly refused to focus its analysis, as the Second Circuit did, on the primary use of the broader locale. Had it done so, it would have determined – as the district court did – that the main purpose and function of the property was to allow access to the thousands of people who wish to visit or tour Church buildings and sites every day. Pet. App. 51a.

Finally, the Tenth Circuit also departed significantly from the Second Circuit's approach in considering governmental intent. Indeed, it ignored the very factors that the Second Circuit found to be crucial, including whether the City had "sought to limit organized speech in the Plaza," and whether through agreements or regulations, it had "evidenced an intent

to conserve the Plaza's function" as something less than a traditional public forum. *Hotel Employees*, 311 F.3d at 551.

Instead, the court below focused narrowly on the easement to the exclusion of all other considerations. Pet. App. 26a. Rejecting any consideration of the City's larger purposes, including drawing more tourists to the downtown area, creating a peaceful place for rest and relaxation, and obtaining more than $8 million in revenue, the Tenth Circuit refused to countenance the government's express intent – as evidenced in the Special Warranty Deed – that its reservation of the easement would not create a public forum of any kind on the Church's private property.[3]

To be sure, at one point the court below stated that it would "reject the contention that the City's express intention not to create a public forum *controls* our analysis" – as though the government's intent would be at least a factor. Pet. App. 15a (emphasis added). Later, however, the court simply rejected the notion out of hand, refusing to give any weight to "the City's express intent not to create a public forum." *Id.* at 28a. Instead, the court found conclusive what it characterized as

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[3] The conflict between the Second and Tenth Circuits is not undermined by the fact that the property at issue in *Hotel Employees* was an entire plaza rather than, in the Tenth Circuit's analysis here, a portion of a plaza that the court considered the functional equivalent of a sidewalk. A plaza, like a sidewalk, can be a traditional public forum. *See Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 757 (1995); *Capital Area Right to Life, Inc.* v. *Downtown Frankfort, Inc.*, 511 U.S. 1135, 1137 (1994) (O'Connor, dissenting from denial of certiorari) (downtown Mall area traditional public forum). Indeed, if anything, a public plaza is generally more likely to be treated as a public forum than a sidewalk or a street. *Compare, e.g.*, *Pinette*, 515 U.S. at 757 with *United States* v. *Kokinda*, 497 U.S. 720, 727-30 (1990) (open government owned streets leading to post office not public forum); *Greer* v. *Spock*, 424 U.S. 828, 836-38 (1976) (open government streets on military bases not public forum).

the easement's "nature and purpose . . . and its similarity to other public sidewalks." *Id.*[4]

* * * *

Simply put, the Second Circuit and the Tenth Circuit are in complete disagreement on how to determine whether property subject to public access rights is a public forum. If the Lincoln Center Plaza were located within the jurisdiction of the Tenth Circuit, that Court would hold the plaza to be a public forum *by ignoring* (1) its location in the middle of the Lincoln Center complex, (2) its primary use as an entrance and for access to the Lincoln Center area, and (3) the local government's express intent not "to provide an open forum for all forms of public expression." *Hotel Employees*, 311 F.3d at 552. Conversely, if the Church Plaza were located within the Second Circuit, that court would hold it not to be a public forum *precisely because of* (1) its location in the middle of the Church's international headquarters, (2) its primary use as an entrance and access to Church properties, and (3) the City's express intention not to create a public forum on the Church Plaza. This Court should grant certiorari to resolve the direct conflict between these two irreconcilable approaches.

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[4] In contrast, the Ninth Circuit analyzed the government's intent in *Venetian Casino Resort, L.L.C.* v. *Local Joint Executive Board of Las Vegas*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002). In that case, the Court concluded that the City of Las Vegas had acquired, by contract, a public easement over a sidewalk situated on private property owned by a casino. However, unlike this case, where the government clearly intended *not* to create a public forum, the Ninth Circuit concluded that the government there had in fact intended "that the function of the replacement sidewalk on the Venetian's property was to be the same as the former public sidewalk in front of the Venetian." *Id.* at 942. Thus, unlike the Tenth Circuit's approach here, the Ninth Circuit relied upon and gave significant weight to the government's express intent as expressed in its written agreement with the private property owner.

## II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A NARROWER CONFLICT OVER THE CIRCUMSTANCES IN WHICH A PRIVATE WALKWAY SUBJECT TO A PUBLIC ACCESS EASEMENT CAN BE DEEMED A PUBLIC FORUM.

The Tenth Circuit's decision also conflicts with the Nevada Supreme Court's ruling in *S.O.C., Inc.* v. *Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001), on a narrower issue, namely, the circumstances in which a public access easement over a private walkway can give rise to a public forum. In *Mirage*, the Nevada Supreme Court held that, except in unusual circumstances such as "where the entity in question performed 'the full spectrum of municipal powers and stood in the shoes of the State,'" such an easement does not create a public forum. *Id.* at 248 (internal quotation marks omitted) (quoting *Hudgens* v. *NLRB*, 424 U.S. 507, 519 (1976)). And that is true, the court held, even if the property is functionally and physically identical to a public sidewalk and is part of the city's pedestrian transportation grid. *Id.* The court thus held that a privately owned sidewalk adjoining a Las Vegas casino was not a public forum for First Amendment purposes, even though the county owned a "'perpetual easement and pedestrian easement over, under, and across'" that sidewalk. *Id.* at 246.[5]

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[5] In *Mirage*, three Justices joined in the "majority" opinion, two Justices issued an opinion concurring in the result, and one Justice dissented. The court's principal opinion, however, was viewed by both the concurrence and the dissent to establish a "majority" holding. 23 P.3d at 252 (Maupin, C.J., concurring "in the majority's result"); *id.* at 252, 253, 254 & n.8 (Rose, J., dissenting) (disagreeing with the decision of "the majority"). This is consistent with prior Nevada Supreme Court cases holding that, in such a circumstance, it treats "the reasoning and holding of the plurality view as binding unless and until overruled by three or more Justices of this court or an intervening act of the Legislature." *Craigo* v. *Circus-Circus Enters., Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990). *Mirage* has not been overruled, and indeed has been relied upon as binding Nevada

In so holding, the court ruled that, under the First Amendment, privately owned property "does not lose its private nature because the public traverses upon it." *Id.* at 247. Accordingly, the "existence of [a pedestrian access] easement alone, without more, does not transform private property into a public forum." *Id.* at 247. That is because "an easement obtained by a governmental entity for a public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained." *Id.* (internal quotation marks omitted). Thus, activities unrelated to pedestrian passage exceed the public's right to use such property. See *id.*

By contrast, under the holding below, the mere existence of an easement for public passage was sufficient to transform what is indisputably private property into a public forum, even though the easement's purpose was limited solely to public passage and the parties expressly disclaimed any intent to create a public forum. Contrary to the analysis in *Mirage*, the Tenth Circuit held that such an easement *does* create a public forum if (a) the nature of the government's property interest allows the public to traverse the property and (b) that property interest would constitute a sufficiently significant interest to trigger a takings analysis under the Fifth Amendment. Pet. App. 12a & 18a.

In short, there is no question that the sidewalk in *Mirage* would have been found to be a public forum under the Tenth Circuit's analysis. Nor is there any doubt that the easement at issue in this case would *not* have been found a public forum under the analysis of the Nevada Supreme Court. That conflict warrants this Court's review.

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law. *See Southwest Adver. Inc.* v. *County of Clark*, 202 F. Supp. 2d 1141, 1145 (D. Nev. 2002) (adopting the "majority" opinion as a holding of the Nevada Supreme Court that a limited public access easement is not a public forum).

## III. IF THE ISSUE IS NOT RESOLVED IN *VIRGINIA* v. *HICKS*, THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHEN A GOVERNMENT MAY CLOSE A PUBLIC FORUM.

This case also raises a third important question, namely, how a government may constitutionally close a public forum consistent with the First Amendment. As explained above, the Tenth Circuit has ruled, in essence, that a government may not constitutionally close a public forum if it chooses to retain a legal interest in the property sufficient to ensure that the property will serve the "purpose" of "pedestrian traffic." See Pet. App. 17a-18a.

Although this Court itself has never expressly addressed the question of how a government can effectively close a public forum, Justice Kennedy (joined by Justices Blackmun, Stevens and Souter) addressed that very question in his concurrence in *Lee*. Justice Kennedy stated that a public forum can validly be closed in any of three alternative ways:

> [T]he government always retains authority to close a public forum, by selling the property, changing its physical character, *or* changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.

505 U.S. at 699-700 (emphasis added). Justice Kennedy's analysis has been followed by a number of lower courts that have held that governments may legitimately choose to close a public forum. See *Hale* v. *Dep't of Energy*, 806 F.2d 910, 911-12 & 916 (9th Cir. 1986) (former public forum street closed through "various land withdrawals" and alteration into "outdoor laboratory for nuclear weapons testing"); *ACLU* v. *City of Las Vegas*, 13 F. Supp. 2d 1064, 1074-75 (D. Nev. 1998) (former public forum street closed through contract with private entity and construction of a mall).

However, the lower courts have struggled with the issue of *how* a government may properly close a public forum. And that confusion is embedded in the lower court opinion in *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003) (granting petition for certiorari), which is currently awaiting argument in this Court.

In *Hicks*, this Court granted certiorari on two questions, the second of which is whether, for public forum purposes, the Constitution "recognize[s] a distinction between actions taken by government as landlord and actions taken by government as sovereign?" Pet. for Cert. at i. In the lower-court proceedings in *Hicks*, a split panel of the Virginia Court of Appeals held that streets and sidewalks that had been "privatized" by the City of Richmond, Virginia, do not constitute a public forum. See *Hicks* v. *Commonwealth*, 535 S.E.2d 678, 683 (Va. Ct. App. 2000).

In a 6-5 decision, the en banc Virginia Court of Appeals reversed the panel decision and held that the streets and sidewalks at issue there in fact remained a public forum notwithstanding their conveyance to another entity that acted, in the City's view, as a landlord rather than sovereign. *Hicks* v. *Commonwealth*, 548 S.E. 2d 249, 254-55 (Va. Ct. App. 2001) (en banc). Like the Tenth Circuit here, that court ruled that because "the streets . . . serve the same *function* they did prior to 'privatization,'" they remained a public forum. *Id.* at 254 (emphasis added). Accordingly, the Court of Appeals held that a "trespass policy" that the City sought to enforce on that property is unconstitutional. *Id.* at 256.

Although the subsequent decision of the Virginia Supreme Court now under review in *Hicks* does not depend upon a finding that the property there is a public forum,[6] the issue of

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[6] On appeal, the Virginia Supreme Court vacated the portion of the Virginia Court of Appeals en banc decision addressing the public forum determination. It held instead that the City policy is unconstitutionally overbroad, regardless of whether the property at issue is a public forum. *See Commonwealth* v. *Hicks*, 563 S.E. 2d 674, 681 (Va. 2002).

how a government can constitutionally close a public forum could play a role in the Court's ultimate decision. In its opposition to the petition, the respondent in *Hicks* indicated its intention to defend the judgment below on the alternative ground that, even if the City policy is not unconstitutionally overbroad, it violates the First Amendment because the property, notwithstanding its conveyance to another entity, is a public forum and the policy cannot withstand strict scrutiny. Resp. Br. in Opp. at 15. In its reply brief, the State conceded that this issue "falls squarely within the second question presented." Reply Br. of Pet. at 8 n.1. Indeed, the State argued that this is an "important federal question" in its own right. *Id.*

If in deciding *Hicks* this Court chooses to address whether the allegedly privatized streets and sidewalks at issue there remain a public forum, the Court's analysis may well determine the correctness of the Tenth Circuit's decision here. Based on Justice Kennedy's analysis, this Court in *Hicks* could decide, for example, that simply conveying a public street or sidewalk is sufficient to close a public forum. And that analysis would be a sufficient basis for reversing the Tenth Circuit's decision here. Alternatively, if this Court in *Hicks* chooses not to address the public forum issue at all, this case presents a perfect vehicle to confront the issue, to resolve the conflicts and uncertainty in the lower courts, and to provide guidance on how a government may properly close a public forum.

Accordingly, this case, at a minimum, should be held pending the disposition of *Hicks*. If this Court's decision in *Hicks* resolves the general question of how a government can appropriately close a public forum, the Court should grant the petition, vacate the judgment, and remand to the court of appeals. If, on the other hand, the decision in *Hicks* does not resolve the public forum question, the Court should grant this petition and address that general issue in the context of this case.

## IV. THIS COURT'S REVIEW IS NECESSARY TO ADDRESS THE SWEEPING PRACTICAL IMPLICATIONS OF THE DECISION BELOW FOR THE CHURCH, THE CITY, AND OTHER GOVERNMENTS AT ALL LEVELS.

In addition to the clear decisional conflicts presented by this case, the Tenth Circuit's decision has sweeping practical implications, not only for religious organizations such as the Church, but also for governments at the local, state and federal levels.

1. First, the Tenth Circuit's opinion creates intractable entanglement problems by mandating direct government regulation of a Church-owned plaza full of religious symbols. The Church uses the Church Plaza to spread its religious message. Depending on the season, the Church will present "'religiously oriented displays, religiously oriented exhibits, . . . religiously oriented celebrations, religiously oriented gatherings, [and] religiously oriented special events'" Summ. J. Mot. ¶ 184 (alteration in original). At Christmas, for example, the Church Plaza features several crèches. *Id.* ¶ 189.

Nevertheless, to comply with the Tenth Circuit's decision, and to avoid conflicts with the Church's maintenance and use of the plaza, the City must now coordinate with the Church regarding speech activities on the easement, especially since the easement has no defined location. Indeed, with a public forum now running across its religious plaza, the Church appears to be in the curious position of having to seek a permit from the City to engage in free speech activities on its own property. In effect, the Church now owns and operates a religiously oriented First Amendment forum – itself a constitutional contradiction – under the "official and continuing surveillance" of the City. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970). This unavoidable consequence of the Tenth Circuit's decision creates an excessive and perpetual entanglement between the City and the Church. Cf., *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971).

But another constitutional issue looms – endorsement. Under the joint management regime mandated by the Tenth Circuit, a "reasonable observer" could well perceive "a message of endorsement of religion" in the City's direct control and regulation of a plaza filled with the religious displays and symbolism of the Church. See *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

The Tenth Circuit's decision thus mandates the kind of relationship between the Church and the City that would never be tolerated if the City and the Church had created it on their own. Given the fact that the Church Plaza is visited by more than five million tourists and others every year, this is an important factor supporting review by this Court.

2. Finally, the Tenth Circuit's opinion threatens to unsettle existing property rights and significantly limit the ability of governments at all levels to sell land. Government-owned public access easements over private property are common, especially in the West. They serve the public good by ensuring, among other things, access to public beaches, parks, and hiking trails. Previously, no one supposed that granting the government a simple access and passage easement might create a public forum. Now, under the Tenth Circuit's decision, the properties of many thousands of unsuspecting private citizens may be burdened by public fora merely because of such easements.

To be sure, the Tenth Circuit stopped short of holding that *all* easements are public fora. See Pet. App. 13a n.5. But the court's excessively narrow test creates serious uncertainties about the public forum status of thousands of properties formerly thought to be wholly private.

More broadly, the Tenth Circuit's holding that a pedestrian access easement can create a public forum – no matter how limited its terms and regardless of the government's intent – has significantly limited the flexibility traditionally enjoyed

by governments at all levels in the acquisition, use and disposition of public lands and public easements. The Tenth Circuit's reasoning means that governments are powerless in many instances to close a public forum while, at the same time, retaining a limited access easement across the property. Unless overturned, the Tenth Circuit's decision will make it difficult, and in many cases impossible, for such entities to sell public property, to reserve easements in such property once it is sold, and to purchase easements from landowners for public use.

These problems are particularly acute under the Tenth Circuit's sweeping holding that mere government "regulation" is sufficient to trigger the First Amendment's public forum analysis. The court's expansive ruling on this issue will have a clear chilling effect on private parties' interest in purchasing property from the government, given that any government "regulation" may lead a future court to impose a First Amendment-protected forum on that property as well.[7]

In sum, the decision below does far more than create multiple conflicts and doctrinal problems in public forum law. It also imposes substantial practical harm on the Church, the City, and other governments at all levels that operate within the Tenth Circuit.

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[7] On this point the Tenth Circuit's holding is in substantial tension with a decision of the Eighth Circuit. In *Van Bergen* v. *Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit held that that "government regulation" is not sufficient to trigger a forum analysis under the First Amendment. *See id.* at 1552 ("the nonpublic forum analysis has not been extended to include privately-created and-owned entities, even when heavily regulated"). In *Van Bergen*, the Eighth Circuit held that no public forum analysis applies where the government only regulates private property, *id.* at 1553, in contrast to the Tenth Circuit. The Tenth Circuit, however, specifically held that "government regulation" would be enough to trigger public forum analysis.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted. In the alternative, the petition for *certiorari* should be held for *Virginia* v. *Hicks*, 123 S. Ct. 990 (2003) (granting petition for certiorari).

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